IN THE

SUPREME COURT OF THE UNITED STATE

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OCTOBER TERM, 190[illegible].

No. 164.

JOHN C. HAMMOND, PLAINTIFF IN ERROR

vs.

WILLIAM W. WHITTREDGE, TRUSTEE UNDER TH
WILL OF SOLON O. RICHARDSON, DECEASED,
ET AL., DEFENDANTS IN ERROR.

Supplemental Brief in Behalf of W. B. H. Dowse, et al., Assignees in Bankruptcy, Defendants in Error.

WARREN OZRO KYLE,
FRED JOY,
of Counsel for Defendants in Error
W. B. H. Dowse, et al.,
Assignees in Bankruptcy

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WILLIAM W. WHITTREDGE, TRUSTEE UNDER THE WILL OF SOLON O. RICHARDSON, DECEASED, *ET AL.*, DEFENDANTS IN ERROR.

SUPPLEMENTAL BRIEF IN BEHALF OF ASSIGNEES IN BANKRUPTCY, W. B. H. DOWSE, *ET AL.*, DEFENDANTS IN ERROR.

If the court should find it necessary to consider the merits of the case it is believed that a correct understanding of the facts will be conclusive in favor of these defendants in error and will demonstrate the correctness of the decision of the Supreme Judicial Court of Massachusetts.

STATEMENT OF THE CASE.

This is a petition for instructions filed February 1, 1901, by the trustee under the will of Solon Osmond Richardson, late of Wakefield, deceased. The testator made his will September 9, 1869, and died August 31, 1873. The will was duly admitted to probate, and there was found a sufficient amount of property to satisfy the provisions of item eight, to which this petition relates. The material portions of the will are as follows:—

"Item Eight.—I hereby give and bequeath to my executors, in trust, the sum of thirty-five thousand dollars to be invested as before herein advised, the income from which I direct to be divided and shared equally between my three following

named sisters, viz: Mary A. Sweetser, Martha Hutchinson and Louisa Richardson." . . . "At the decease of all my three said sisters I direct that the fund from which they have derived an income from my property be divided equally between the children of my said sisters, and I direct my executors to pay to them each their respective part, the same to be the property of the children of my said sisters forever."

The three sisters mentioned as beneficiaries all survived the testator, but have now all deceased, the last survivor being Mary A. Sweetser, who died December 15, 1900. Martha Hutchinson had as her only child a daughter, Martha A., born before the death of the testator, and now the wife of the petitioner, William W. Whittredge, trustee. Louisa Richardson never had any children. Mary A. Sweetser had as her only child a son, Elbridge L. Sweetser, who was born before the death of the testator, is now living, and one of the respondents in this case. There is no question that Martha A. Hutchinson, now Mrs. Whittredge, is entitled to one-half of the fund; and it is equally clear that the respondent, Elbridge L. Sweetser, would be entitled to the other half, if his interest in the fund had not passed to his assignees in bankruptcy under the law of 1867, who are now entitled thereto. Sweetser's adjudication in bankruptcy in the proceedings under which the assignees claim title was on February 23, 1878. There is no assignment or lien of Sweetser's interest of earlier date. The bankrupt did not mention his interest under the Solon O. Richardson will in his bankruptcy schedule, and his assignees in bankruptcy had no knowledge that any such interest existed until September, 1882.

The respondent Sweetser has always claimed that under said will of his uncle he took no interest either present or potential that could pass by assignment, but rather a mere possibility or expectancy that would become property only on the death of the last survivor of the three sisters. He has made some mortgage assignments or deeds (Exhibits 3, 4 and 5, Record, pages 47 to 52, and answer of Atkins, page 33 of the Record) of all his right, title and interest in the trust property which he then had (October, 1885, and March, 1886,

long after the first bankruptcy, February, 1878) or to which he might at any time be entitled; but these mortgages or deeds were never recorded, no notice of them was given to his assignees in bankruptcy, and there has been nothing to indicate any change in the position he held at the time of filing his original petition in bankruptcy, and which he intends to set up by his answer in this case namely, that he never had any interest to pass to anybody until the death of his mother. The assignees in bankruptcy never had any knowledge of any of the bankrupt's assignments, deeds or mortgages, which were all subsequent to the bankruptcy proceedings under which they claim title, until pleaded in this suit.

As soon as Sweetser's assignees in bankruptcy heard of his interest under the Richardson will, they promptly notified the trustee of this fund that they claimed it, and, in order to make such notice a matter of record, summoned the trustee to answer in the United States District Court to a bill in equity, a copy of which is found on pages 10, 11 and 12 of the Record.

The Florence Machine Co., a creditor of E. L. Sweetser, to whose interest John C. Hammond, the plaintiff in error, through mesne conveyances has succeeded, and W. P. Harding, a creditor of Hannah Sweetser (wife of E. L. Sweetser), have brought bills in equity, since the bankruptcy of 1878, seeking to reach and apply any interest of their respective debtors in this fund to the payment of their claims. By a second bankruptcy, November 26, 1900, Sweetser again surrendered all his property to his creditors, and, on the death of his mother, December 15, 1900, claimed that then, for the first time, an interest in the fund had become his property, and had vested in himself, free from any claims of creditors or assignees whatsoever. The respondent, E. L. Sweetser, is the only one holding this view.

There is now no dispute as to the interest under the will of Solon O. Richardson, which is the subject of the controversy, and it is agreed that said interest was of such nature as would pass by assignment in February, 1878, when Elbridge L. Sweetser, who then owned it, was adjudicated a bankrupt. "The

interest of Elbridge L. Sweetser under the said will of Solon O. Richardson was not mentioned or referred to in his schedule in bankruptcy." (See Agreed facts, Record, page 35.) Not only did the bankrupt fail to disclose this property in his schedules of property, but his assignees in bankruptcy had no knowledge of said interest until 1882, when they immediately asserted their title thereto and within a few days, September 19, 1882, began a suit in Equity in the District Court of the United States against the bankrupt and the Trustee under the Richardson will. In this suit the plaintiff in error appeared as defendant, July 1, 1901. (See Agreed Facts, Record, pages 10, 36 and 40.) This is the suit referred to in the closing paragraphs of the opinion of the Supreme Judicial Court of Massachusetts. (See opinion by Loring, J., Record, page 63.) The Florence Machine Co., a creditor in the bankruptcy proceedings, had obtained earlier information about said interest under the will of Solon O. Richardson, and had brought its bill in Equity in November, 1881, to reach and apply it in payment of notes given after the bankruptcy. Said bill in Equity was brought under General Statutes of Massachusetts, c. 113 § 2, which reads as follows: "The court may hear and determine in Equity all cases hereafter mentioned, when the parties have not a plain, adequate and complete remedy at the common law: that is to say;—(clause 11)—Bills by creditors to reach and apply, in payment of a debt, any property, right, title or interest, legal or equitable, of a debtor, within this state, which cannot be come at to be attached or taken on execution in a suit at law against such debtor." This suit is important as the plaintiff in error bases his right to prevail here on this suit and his alleged rights supposed to arise therefrom. The parties to the suit last named were the Florence Machine Co., plaintiff, and Elbridge L. Sweetser, the bankrupt, and Solon O. Richardson, trustee, son of the deceased, defendants. The defendant, Solon O. Richardson, in his answer, at once raised the point that the interest referred to in the bill, if it had ever vested in Sweetser, had passed to his assignee in bankruptcy; (Record, page 25) and the assignees in their suit in Equity above referred to (Record, page 10) made the same claim, and

asserted their title to said property, which, already within the jurisdiction of the bankruptcy court by virtue of the proceedings in bankruptcy in the case of Elbridge L. Sweetser, was again by their said suit brought within the custody and control of the United States District Court for the District of Massachusetts. Shortly thereafter, the attorney for the Florence Machine Co., was made one of Sweetser's assignees in bankruptcy, and has continued in that capacity to the present time and is one of the defendants in error in this case. It does not appear when said assignee in bankruptcy ceased to be attorney for the Florence Machine Co., in its long pending Equity suit under which the plaintiff in error now claims; but the record shows (page 27) that on August 14, 1894, both assignees in bankruptcy became parties defendant in said suit, being then for the first time cited to appear, although the plaintiff, the Florence Machine Co., had been fully advised of the title of the assignees both by said answer of Richardson, trustee, and through the knowledge of its attorney in the suit, who had also been assignee in bankruptcy since December, 1882. It should, perhaps, be noted that the Florence Machine Co., was dissolved by Act of the Legislature on April 19, 1893, and on October 1, 1894, assigned all its choses in action of every description (see Agreed Facts, Record, page 38). In this suit of the Florence Machine Co., begun in 1881, as above stated, by which the plaintiff in error now attempts to overturn the title of the assignees in bankruptcy, no claim was ever made that said assignees had forfeited their rights until December 11, 1904, when John C. Hammond, the plaintiff in error, filed a motion in said equity suit, (see Agreed Facts, last paragraph Record, page 42), and this was nearly four years after Whittredge, trustee, had filed his petition for instructions, which is the case in which this writ of error is brought, and nearly four years after the assignees had filed their answer to said petition. (Record, page 5.) The said assignees had filed their answer in said Equity suit (Record, page 29) in 1899, May 20, (Record, page 39) more than five years before Hammond had filed his motion above referred to, asking leave to file a special replication to said answer setting up for the

first time the statute of limitations, U. S. Rev. Stat. 5057, as a bar to the claim made by said assignees in said answer; it should be noted that said motion, so far as appears, has never been brought to the attention of the court, and said special replication has never become a part of the record of said suit. It should also be noted that until the plaintiff in error became a party to this long continued litigation, it had been conducted in a most friendly spirit, neither party claiming any advantage except as might come from an authortative interpretation of the will of Solon O. Richardson. If Sweetser's interest was adjudged to have passed to the assignees in bankruptcy, the Florence Machine Co., having proved a large claim in said bankruptcy, would be benefited, while if the courts should decide otherwise, its bill in Equity might prove of value to reach and apply Sweetser's interest, if any. The corporation's attorney in the Equity suit was also one of the assignees in bankruptcy, and there never was any claim of forfeiture of anybody's rights, either by abandonment, laches or by statute of limitations.

BRIEF OF ARGUMENT.

The plaintiff in error colors every incident by his willful misconstruction of a peaceful and harmonious situation to suit his warlike fancy and the exigencies of his case. He was in the beginning neither active nor aggressive. He first acquired through mesne assignments, the control of the Equity suit in 1896, fifteen years after it was begun, and then waited two and one-half years more before filing his motion to prosecute said suit (Record, page 28); he then took no further action until five more years had elapsed when he filed the motion above referred to which was never allowed, or, indeed, brought to the attention of the court. (Agreed Facts, last paragraph, Record, page 42.) No further or other action was ever taken by the plaintiff in error in this suit, and it is to be noted that in this Equity suit, so lately discovered to be of vital importance, no injunction was granted, no hearing was ever had, and no order or decree of any kind has ever been made.

When the present suit was brought by the trustee under the will asking the instructions of the Supreme Judicial Court of Massachusetts as to what the trustee should do with the Sweetser half of the fund, all the life beneficiaries having deceased, the present plaintiff in error appeared therein, by his present counsel, and asked to be made a party and filed his answer. (See "Motion of John C. Hammond to be admitted as Party in the Suit," and "Answer of John C. Hammond," Record, pages 8 and 9.)

We desire to call the attention of the court to this motion and answer. In the former he prays to be admitted as a party, "and claims to be entitled to the trust fund in controversy, subject to the rights of the assignees in bankruptcy of said Sweetser" (Record, page 8); and in the answer he claims only so much of the fund as may be sufficient to pay a certain claim amounting to $1,809.00 and interest secured by a mortgage of the fund made by the bankrupt in October, 1885 (Record, pages 8 and 9). Of this mortgage his assignees in bankruptcy had no knowledge until it was pleaded in this case by the plaintiff in error. Not a word appears in either motion or answer about the Equity suit of the Florence Machine Co., and the so-called equitable attachment. Hammond did not change his answer until nearly four years had elapsed. On November 21, 1904, Hammond amended his answer to read as on pages 14, 15, 16 and 17 of the Record, setting forth his claims and the assignments by which he had acquired title thereto, and then for the first time referring to the suit of the Florence Machine Co. as an equitable attachment, and assuming that said suit had ripened with age so that whereas in the beginning it could only reach and apply, by virtue of a statute, property of the defendant debtor which he then had when the suit began, nevertheless it now covered and appropriated property which the debtor did not then have, property which had passed from him by operation of the bankrupt law, though concealed and not mentioned in his schedules, property which his assignees in bankruptcy had claimed as soon as they had discovered it, and had seized and appropriated so far as the same could be taken in possession before

rights of any innocent third party without notice had intervened. Alleged rights under this suit and as assignee of a mortgage by the bankrupt of this concealed property are the basis of the claims of the plaintiff in error to be heard in this court. These alleged rights rest not upon any law of the United States, but upon a claim of defect in the title of the assignees. If the assignees in bankruptcy did not abandon this property, but, on the contrary, claimed it as soon as discovered to be held in trust for the creditors of Sweetser, who proved their claims, it is clear that the decision of the Supreme Judicial Court of Massachusetts must be affirmed. The decree in this case is explicit on this point in the fourth paragraph, viz: "The said assignees in bankruptcy did not abandon said property, and have not been guilty of laches in relation thereto." (See Final Decree, Record, page 58.) In view of the immediate action of the assignees in asserting their title to this property as soon as discovered no other conclusion was possible, and this point is decisive of the whole case. It is too absurd to admit of argument that by omitting property from his schedules and concealing it from his assignees for more than two years a bankrupt or his assigns after bankruptcy can set up title thereto and bar his assignees in bankruptcy by the two years statute of limitations, when said property is claimed by them for the benefit of the creditors in bankruptcy as soon as discovered. There is nothing in this record to show any lack of diligence on the part of Sweetser's assignees in bankruptcy. That the Florence Machine Co. had knowledge of this interest in remainder under the Richardson will some months before it was disclosed to the assignees in bankruptcy is suggestive of nothing except a conspiracy between the bankrupt and one of his largest creditors to sequester this property for their mutual benefit. The failure to schedule the property and concealment of it from the assignees in bankruptcy for several years was clearly in fraud of the bankrupt law, and can hardly be claimed to constitute such an immunity as to deserve protection under the judiciary act or any other law of the United States.

Moreover the so-called equitable attachment by the Equity

suit begun before the existence of this property was disclosed to the assignees in bankruptcy, is not an attachment in any sense of the word.

"It has repeatedly been held that a plaintiff bringing a bill in Equity under the provisions of the Public Statutes, c. 151 §2 cl. 11, and the statute of 1884, c. 285 §1, to reach property of the debtor which cannot be come at to be attached or taken on execution in a suit at law against such debtor, does not thereby acquire a lien on the property which will prevent it passing to an assignee in insolvency.

Trow vs. *Lovett*, 122 Mass. 571.
Squire vs. *Lincoln*, 137 Mass. 399.
Powers vs. *Raymond*, 137 Mass. 483.

"Such a proceeding, even if followed by an injunction against any disposition of the property of the debtor, does not constitute an attachment, within the meaning of the Public Statutes, c. 157, §§46, 47, and does not defeat the right of the assignee to have everything that belongs to the debtor which can lawfully be taken at law or in equity and applied to the payment of his debts."

Knowlton, J., In Opinion of the Court.
Fish vs. *Fiske*, 154 Mass. 302, 304.

We submit that if such a proceeding cannot defeat the rights of assignees to have everything that belongs to the debtor in case of subsequent insolvency, *a fortiori*, it cannot be held to constitute a bar to assignees in bankruptcy, who are promptly seeking to apply the property of the bankrupt, as soon as discovered, to the payment of his debts.

This Equity suit with no injunction, no order, no decree, not even a hearing in twenty odd years, amounts to nothing but a mere *lis pendens*, and has no effect upon the title of the assignees in bankruptcy, the defendants in error.

As to the statute of limitations U. S. Revised Statutes, §5057, under which the plaintiff in error claims immunity, we have already in our brief on the motion to dismiss called attention to the findings of the Supreme Judicial Court deciding on

grounds of local law, involving no federal question, that the plaintiff in error had never acquired any title in defence of which he could plead such a statute; and the state court did not find it necessary to construe said statute; but, we submit, the section referred to (§5057 U. S. Rev. Stat.) does not apply to a case like the present for other reasons.

This section provides as follows: "No suit, either at law or in Equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action, barred at the time when an assignee is appointed." The latest decision of this court construing this statute is *Dushane* v. *Beall*, decided March 16, 1896, (161 U. S. 513), in which Chief Justice Fuller, delivering the opinion of the court says: "That limitation is applicable only to suits growing out of disputes in respect of property and rights of property of the bankrupt which came to the hands of the assignee, to which adverse claims existed while in the hands of the bankrupt and before assignment."

Dushane vs. *Beall*, 161 U. S. 513
Bowen vs. *Del., L. & W. R. R.*, 153 N. Y. 476.

This court also said, in 1879, construing the same statute, that it relates to suits by or against the assignee with respect to parties other than the bankrupt; and, we submit, it cannot apply as against the assignees to establish a title either in the bankrupt himself, or in others, when derived from the bankrupt since his adjudication, to property which passed to the assignees by operation of the bankrupt law, unless such property has been abandoned by the assignees in bankruptcy.

Phelps vs. *McDonald*, 99 U. S. 298, 306.
Clark vs. *Clark*, 17 How. 315.
Thomas vs. *Blythe*, 8 U. S. App. 414.

This is not a suit "between an assignee in bankruptcy and a person claiming an adverse interest." The petitioner, who is the trustee under the will, claims no adverse interest and does not plead the statute.

Nash vs. *Nash*, 12 Allen, 345.
Minot vs. *Tappan*, 127 Mass. 333, 338.
In re A. H. English, 6 Fed. Rep. 276.

Moreover, all statutes of limitation begin to run from the time the cause of action accrues, and, in this case, could not run until the right to the possession of the Sweetser half of the fund fell to the assignees, on the death of the bankrupt's mother, the last survivor of the testator's three sisters.

Perry on Trusts, §860.
French vs. *Merrill* 132 Mass. 525, 527, and cases there cited.

As it was necessary to await the termination of the life interests before any one claiming through the remainder man could claim possession of the fund, the assignees in bankruptcy have not been remiss, and the delay, if any, has not operated to the prejudice of anybody, hence there has been no laches.

Haven vs. *Haven*, 181 Mass. 573, 579.
Tucker vs. *Fisk*, 154 Mass. 574, 579, and cases cited.
Ryder vs. *Loomis*, 161 Mass. 161, 163.
Beale vs. *Chase*, 31 Mich. 532.
New York Bank Note Co. vs. *Hamilton Co.*, 28 N. Y. App. Div. 411.
Ulman vs. *Clark*, 75 Fed. Rep. 868.

In conclusion we say, as in the beginning of this section of our brief, that a correct understanding of the facts can lead only to affirmance of the decision of the Supreme Judicial Court of Massachusetts. The Record is confusing as it is encumbered with answers of claimants who have failed to press their claims, and numerous papers that have no bearing

on the only points raised in the assignment of errors; but it plainly appears that the assignees in bankruptcy, defendants in error here, did not abandon this property, that the delays have been inevitable, that no interests have suffered thereby, and that now the fund should be paid over to these defendants in error, the assignees in bankruptcy, as quickly as possible, for distribution in the bankruptcy proceedings of Elbridge L. Sweetser, begun in 1878 in the United States District Court for the District of Massachusetts.

WARREN OZRO KYLE,
FRED JOY,

Of Counsel for Assignees in Bankruptcy, Defendants in Error.